found the appellant guilty ought to have recorded a conviction.

Acting in revision, therefore, I cured the irregularity by recording an order of conviction.

Having heard the evidence of the Probation Officer I came to the conclusion that this was a case where it would be proper to make an order in the nature of a probation order, and I, therefore, bound over the appellant in the sum of $500 with his two brothers as sureties for a period of two years to be of good behaviour; and I made it a condition of the bond that he should reside in Butterworth and should not during the period of the bond enter Mukims XIII and XIV in the Ayer Itam area, Penang. In view of his residing in Butterworth I made no order in regard to the Probation Officer, but this Officer undertook to keep the accused under observation from time to time.

Order accordingly.

TAN TEOW SWEE v. REGINA

[A. Cr. J. (Spenser-Wilkinson J.) December 14, 1954]
[Penang — Criminal Appeal No. 53 of 1954]

Penal Code ss. 380, 454 and 457 — Possession of recent stolen property — Presumption under s. 114 Evidence Ordinance — Withdrawal of Counsel after prosecution case — Whether adjournment should be granted to enable accused to obtain another Counsel.

The appellant was charged with housebreaking by night by entering a building to commit theft under s. 457 of the Penal Code. At the end of the prosecution case the learned President amended the charge to one under s. 380 Penal Code i.e. theft in a dwelling. Counsel for the appellant withdrew from the case on refusal by the Court to adjourn the hearing for 12 days on the amended charge, though Court was willing to grant a short adjournment.

There were 2 grounds raised in the appeal. First, that there was no evidence that the appellant was sufficiently in possession of the stolen property (26 bags of tea dust) to raise the presumption under s. 114 Evidence Ordinance and second, that the Court should have given the appellant an opportunity of obtaining another Counsel.

Twelve of the bags had been stored with P.W. 6 and subsequently sold and delivered by the appellant to P.W. 7. 10 bags were found in an open space on being pointed out by the appellant to the investigating officer; 2 bags were found loaded on a tricycle which was being pedalled by some unknown person.

Held: (1) with regard to the 12 bags there was evidence that they were very recently stolen property and that the appellant was in possession of them. Regarding the 10 bags, the evidence given by the investigating officer should not have been admitted without evidence as to what the appellant had said which led to the officer to go with him to find the sacks; (2) on the second ground of appeal, in view of the strength of the evidence it is clear that the presence of Counsel for the defence at that stage would have made no difference and that therefore the accused was in no way prejudiced.

Cases referred to:—

(1) *Rex v. Laughlin* 35 Cr. App. R. 69.

(2) *Tai Chai Keh v. Public Prosecutor* (1949) M.L.J. 68.

(3) *Lim Ah Oh v. Rex* (1956) M.L.J. 269 p. 270; (1950) M.L.R. 236 p. 238.

MAGISTRATE'S CRIMINAL APPEAL.

I. K. Meek for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Cur. Adv. Vult.

Spenser Wilkinson J.: — The appellant was charged before the Sessions Court with housebreaking by night by entering a building in order to the committing of the offence of theft of 26 sacks of tea dust valued at $6,500, contrary to Section 457 of the Penal Code.

At the close of the case for the prosecution Counsel for the appellant submitted that there was no evidence under Section 457 whereupon the learned President amended the charge to one of theft in a building of the same 26 sacks of tea dust, contrary to Section 380 of the Penal Code. It is not clear upon what ground it was submitted that there was no evidence under Section 457. Presumably the submission was made because there was no precise evidence of the time at which the breaking took place. Counsel appears to have been under the impression that Section 114 of the Evidence Ordinance did not apply to housebreaking. I think there is no doubt that it does. In *Rex v. Loughlin*[1], the Court of Criminal Appeal said:—

"It is perfectly good evidence of the prisoner being the housebreaker that he is found in possession of property stolen from a house quite soon after the breaking."

Illustration (a) to Section 114 of the Evidence Ordinance is but an illustration of the general proposition contained in the Section and I have no doubt the principle expressed in *Rex v. Loughlin*[1] applies as much in this country as it does in England. I think it was unfortunate that the learned President did not alter the charge to one under Section 454 (housebreaking in order to the committing of theft) rather than to one under Section 380.

The appellant was re-charged upon the amended charge and claimed trial whereupon Counsel for the defence was asked whether he would like a short adjournment in order to consider the amended charge. In reply to this Counsel asked for an adjournment to a date about twelve days ahead, which the learned President (in my view quite properly) refused, whereupon Counsel asked for leave to withdraw from the case. The learned President thereupon (also in my opinion very properly) informed Counsel that if he wished to leave the Court he might do so, but that he could not give him leave to withdraw. Counsel thereupon left the Court leaving his client to fend for himself as best he could.

The appellant was then called upon for his defence and elected to give evidence on affirmation, which he did. He was also asked whether he wished to recall any of the prosecution witnesses present in Court or its precincts and he said he did not. The appellant then called two defence witnesses and at the conclusion of the evidence he was convicted under the amended charge and sentenced to six months' imprisonment.

Two main points were raised on behalf of the appellant in the appeal. The first was that there was no evidence that the appellant was sufficiently in possession of the stolen property to raise the presumption under Section 114 of the Evidence Ordinance, and the second was that the Court should have given the appellant an opportunity of obtaining another Solicitor.

With regard to the first point, upon my pointing out certain passages in the evidence, Counsel for the appellant abandoned his contention with regard to the possession of 12 of the bags of tea dust in question which had been stored for a short time with P.W. 6 and had been subsequently sold and delivered by the appellant to P.W. 7. There was no doubt that these 12 bags formed part of the total of 26 bags which had been stolen some time during the previous night from the complainant's godown which had been broken into, and in my opinion there is equally little doubt that the appellant was in possession of them.

With regard to the remaining 14 bags of tea dust, the subject matter of the charge, 10 bags were found in an open space in McNair Street and 2 bags had been found by the complainant loaded upon a tricycle, which was being pedalled by some person unknown but which subsequently proved to be the property of the complainant.

The only evidence with regard to the 10 sacks in McNair Street was that given by the Investigating officer, P.W. 1 who said :—

"At 1205 hours on 13th accused took me to an open space in McNair Street where he pointed out to me 10 further sacks of tea dust."

In this connection I would draw attention to a passage from the judgment of the Court of Appeal in the case of *Tai Chai Keh v. Public Prosecutor*[2], F.M. Criminal Appeal No. 130 of 1948, which is digested in the (1949) M.L.J., at page 68 :—

"We desire to point out also that where the circumstances of a case are such that Section 27 of the Evidence Enactment can properly be invoked, then the whole of that Section should be used . . . . It does not appear to be sufficiently appreciated that evidence to the effect that an accused person has pointed out an object to the Police, if it is admissible at all, is really of little value and is often prejudicial to the accused unless the information which led to the discovery is disclosed at the same time."

In the present case the evidence that the accused pointed out the sacks of tea dust standing by itself might indicate that the accused desired to confess his guilt by showing to the Police the sacks of tea dust which he considered to be in his possession; but it might equally show that the accused intended to indicate somebody else's guilt.

A similar wiew was expressed by the Court of Appeal in *Lim Ah Oh v. Rex*[3], where Murray-Aynsley C.J. said :—

"Section 27 in certain cases permits evidence of what an accused person said, by way of exception to Section 124 of the Criminal Procedure Code and of the provisions relating to confessions. But evidence must be given of what the appellant said. Nothing justifies inviting the jury to guess what he said."

I do not think, therefore, that this evidence given by the investigating officer should have been admitted without evidence as to what it was the appellant had said which led the officer to go with him to find the sacks. In any event I think it very doubtful whether it can be said that sacks dumped upon an open space in a town can be said to be in anybody's exclusive possession.

With regard to the two sacks found in the tricycle I did not think that this constituted sufficient evidence of possession, particularly as the physical possession of the sacks when found was clearly in the person who was pedalling the tricycle who appears not to have been the appellant.

For these reasons I held that possession of the 10 sacks and of the 2 sacks had not been proved, and I therefore altered the charge from one in respect of 26 sacks of tea dust to one in respect of 12 sacks of tea dust.

With regard to the 12 sacks, there was in my opinion ample evidence that these sacks were very recently stolen property and that the accused was in possession of them. The explanation given by the accused clearly raised no doubt in the mind of the learned President as to the guilt of the accused and in my opinion as regards these 12 sacks the case was a very clear one.

With regard to the other ground of appeal, if I had thought that there was any possibility that the accused had been really prejudiced in his defence by the absence of Defence Counsel I should have been inclined to order a fresh trial. In view of the facts that the whole of the case for the prosecution had already been given; that the witnesses had been fully cross-examined; and that there could be no possible reason for recalling any witnesses when the charge was amended, it seemed to me that the only benefit which the appellant had lost was the possible benefit of an address on his behalf by Counsel at the conclusion of

the case. In view of the strength of the evidence, however, it is clear to me that the presence of Counsel for the defence at this stage of the case would have made no difference and that therefore the accused was in no way prejudiced.

With regard to sentence, the learned President in his grounds of decision said:—

"I felt that the absence of his Counsel might have meant that some relevant point in mitigation had not been put, so I sentenced him, in spite of the value of the property stolen, to what would otherwise be, in my opinion, a very inadequate sentence."

The learned Deputy Public Prosecutor pressed upon me that from any point of view and whether the offence was in respect of 12 or 26 sacks of tea dust a sentence of six months' imprisonment was, in view of the previous convictions of the accused, manifestly inadequate; and in spite of the eloquent plea put forward on behalf of the appellant by his Counsel I could not but agree with the submission of the Deputy Public Prosecutor.

It may be that the learned President went rather too far in assuming the possibility of mitigating circumstances, but he cannot in my opinion be blamed for this as the desertion of the appellant by Counsel at the trial placed the learned President as well as the appellant in a very difficult position.

I therefore felt it my duty to enhance the sentence, and taking into consideration the fact that the charge stood only as one in respect of 12 bags of tea dust I increased the sentence from one of six months' imprisonment to one of twelve months' imprisonment.

Order accordingly.

Solicitors for the appellant: *Presgrave & Matthews.*

IBRAHIM BIN DAUD v. PUBLIC PROSECUTOR

[A. Cr. J. (Hamid J.) April 19, 1955]

[Kuala Trengganu—Criminal Appeal No. 17 of 1954]

Criminal Procedure Code (Cap. 6), ss. 153(ii) and 163—Whether consolidated charges in contravention of—Penal Code s. 406—Criminal breach of trust—Lumping of various sums of money into one charge under s. 153(ii) Criminal Procedure Code.

The appellant was convicted for criminal breach of trust of $315 under s. 406 of the Penal Code. A list setting out the names of nine persons from whom the appellant received various sums totalling $315 was appended to the charge.

Held: as the appellant was charged for criminal breach of trust of money and not of articles and neither was he charged for cheating, the lumping of the various sums of money into one charge is good under s. 153(ii) of the Criminal Procedure Code.

Cases referred to:—

(1) *Abdur Rahim v. Emperor* A.I.R. 1931 Pat. 102.

(2) *Nga San Mya v. Emperor* A.I.R. 1933 Rang. 325.

(3) *Sheikh Hassan v. Public Prosecutor* (1940) M.L.J. 69.

(4) *Lim Yean Leong v. Public Prosecutor* (1940) M.L.J. 272.

MAGISTRATE'S CRIMINAL APPEAL.

Maidin bin Mohamed Ibrahim, Pleader, for the appellant.

M. Garton (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Hamid J.: —The charge on which the appellant was tried and convicted was for criminal breach of trust of $315 under section 406 of the Penal Code. A list was appended to the charge setting out the names of nine persons from whom the appellant received various sums which total $315. The appeal is only on law and not on facts.

It has been urged that each of the nine transactions was complete by itself and that there were nine distinct offences for which there should have been nine distinct charges; and that to consolidate them into one charge contravenes section 163 of the Criminal Procedure Code. In support of that contention *Abdur Rahim v. Emperor*[1] and *Nga San Mya v. Emperor*[2] were cited. In the former case the charge was in relation to not less than eighty separate acts of cheating in which payments were not shown to have been made at one and the same time nor even at the same place. In the latter case the charge was criminal breach of trust for pawning six pairs of gold bangles from time to time. It was held in both cases that each act was complete in itself and there should be separate charges. This appeal is, however, different from those two cases in that the appellant was charged for criminal breach of trust of money and not of articles; nor was he charged for cheating. In *Sheikh Hassan v. Public Prosecutor*[3] and *Lim Yean Leong v. Public Prosecutor*[4], the Court of Appeal held that the lumping of various sums of money into one charge is good under the provisions of section 153 (ii) of the Criminal Procedure Code.

The other ground taken on appeal is that the evidence pointed to some other offences besides criminal breach of trust. The learned President has considered this point and I find that his conclusion that the offence was criminal breach of trust is well-reasoned.

The appeal is therefore dismissed, and the conviction and sentence upheld.

Appeal dismissed.